BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN GRUB	)	
Claimant	)	
	)	
VS.	)	
	)	
MCPHERSON CONTRACTORS, INC.	)	
Respondent	)	Docket No. 264,300
	)	
AND	)	
	)	
KANSAS BUILDING INDUSTRY	)	
WORKERS COMPENSATION FUND	)	
Insurance Carrier	)	

ORDER

Respondent's insurance carrier, Kansas Building Industry Workers Compensation Fund, appeals Administrative Law Judge Steven J. Howard's May 16, 2001, preliminary hearing Order.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's requests for medical treatment and temporary total disability compensation for a February 12, 2001, work-related accident while claimant was employed by respondent.

On appeal, respondent's insurance carrier, Kansas Building Industry Workers Compensation Fund (KBI), contends first, the parties are not subject to the Kansas Workers Compensation Act (KCWA) because, on the date of the accident, claimant was not an employee of the respondent but instead was an independent contractor of the respondent. Second, even if claimant was an employee of the respondent, KBI denies any liability for claimant's work-related injuries because respondent failed to pay the necessary premium to cover the risk of loss for claimant's work-related injuries.

In contrast, claimant requests the Appeals Board (Board) to affirm the ALJ's preliminary hearing Order. Claimant contends, on the date of the accident, February 12, 2001, he was an employee of the respondent instead of an independent contractor. Thus, claimant argues respondent is liable for his work-related injuries pursuant to the KCWA. On appeal, claimant also questions whether the insurance coverage issue is an issue that the Board has jurisdiction to review from a preliminary hearing order.

Respondent was represented by counsel separately at the preliminary hearing but it did not appeal nor did it file a brief before the Board.

FINDINGS OF FACT & CONCLUSIONS OF LAW

After reviewing the preliminary hearing record, and considering the arguments contained in the briefs, the Board affirms the ALJ's preliminary hearing Order.

In the last week of May 2000, claimant was requested by respondent to bid on some cabinetry and finish trim work on a school construction project respondent was completing in Leavenworth, Kansas. Claimant is an individual finish carpenter doing business as John Grubb Construction.

At the time claimant arrived at respondent's job location, respondent was not ready for the installation of cabinets or any finish trim work to be completed. Respondent was behind on the construction project and needed workers to complete other phases of the project such as iron work, demolition and various other construction duties.

Respondent's superintendent asked claimant to perform these other construction work duties until the project was completed to the point the cabinetry and finish trim work was needed. Claimant and respondent's superintendent orally agreed for respondent to pay claimant an hourly wage plus pay the two student summer employees that were employed by claimant an hourly wage to work on the project. The employment agreement was for claimant to receive $27.00 per hour and for the summer student employees to each earn $17.00 per hour. The agreement also called for respondent to pay the claimant's and the other two employee's salary in a lump sum to John Grubb Construction and then claimant would pay himself and the other two employees from the John Grubb Construction account. Respondent would not deduct any withholding taxes from the lump sum amount paid to John Grubb Construction.

The employment agreement also called for the claimant and the two summer student employees to be covered under the respondent's workers compensation policy. The premium for this coverage was deducted from each weekly lump sum payment respondent paid to John Grubb Construction for the work that claimant and the two summer student employees had completed for respondent.

After claimant started working for the respondent, he did not bid on a specific contract or otherwise perform work pursuant to a separate contract for the cabinetry and finish trim work. The claimant performed the cabinetry and finish trim work based also on the hourly agreement he had with respondent.

On February 12, 2001,claimant was installing a large single cabinet for respondent when claimant testified he "felt something pop out of my back." At that time, claimant did not immediately suffer from extreme pain. But later as he was riding home from work he experienced "a lot of pain." By the next morning, claimant was in extreme pain and notified respondent's superintendent that he had hurt his back at work the day before. Claimant originally went to a local chiropractor for treatment. But claimant did not make any improvement under the chiropractor's treatments.

The medical records admitted into evidence, at the preliminary hearing, show claimant received conservative treatment first from Dick Gees, M.D. in Topeka, Kansas, and then from Leland C. Reit, M.D. in claimant's hometown of Wamego, Kansas. Claimant was referred by Dr. Reit for a consultation to neurosurgeon John D. Eberling, M.D.

Dr. Ebeling found claimant did not have a herniation or any other type of lesion in the vertebral discs located in claimant's lumbosacral spine area. Dr. Ebeling's diagnosis was mechanical back pain syndrome believed to be due to the degenerated L5-S1 disc. He did not recommend surgery. The doctor recommended claimant continue conservative measures such as back exercise routine, weight loss and anti-inflammatory medication as needed.. Claimant, on the date of the preliminary hearing, May 15, 2001, testified he remained unable to work because of his low back injury.

In determining whether claimant was an employee or an independent contractor of respondent, the primary test used by the courts is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work was to be performed. It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control that renders one an employee rather than an independent contractor.[1] In addition to the right to the control of a worker, other commonly recognized factors for determining whether a worker is an employee or an independent contractor are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the workers business; (3) the employment of assistants and the right to supervise their activities; (4) the workers obligation to furnish tools, supplies and materials; (5) the workers right to control the progress of the work; (6) the length of time that the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work is part of the regular business of the employer.[2]

The Board finds, based on the following facts, that claimant established that at the time of his accident, he was an employee of the respondent and subject to the provisions

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[1] *See* Wallis v. Secretary of Kans. Dept. of Human Resources, *236 Kan. 97, 102-103, 689 P.2d 787 (1994).*

[2] *See* McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994).

of the KWA.

a. Claimant contracted with respondent to perform various construction jobs and not just one particular job. Claimant testified he did iron work, concrete work, installed windows, waterproofing work, carpentry and finish trim work as well as negotiated on respondent's behalf with vendors to solve various construction problems.

b. Claimant and his two student summer employees were directly supervised by respondent's superintendent and assistant superintendent. They were told what jobs to complete and how to complete the jobs.

c. Respondent supplied all materials and some of the tools to complete the construction work.

d. Claimant was employed only by the respondent and did not work as an employee or an independent contractor for another employer from the last week in May of 2000 until his work-related accident on February 12, 2001.

e. Claimant and his two student summer employees were paid by the hour and not paid by the job completed.

f. All of the work claimant and his summer employees performed was construction work on the school project which was part of respondent's regular business.

The respondent presented no evidence to contradict claimant's testimony in regard to his employment agreement with respondent to perform work on the school project. The basis of the employment agreement and the procedure followed to carry out the employment agreement was established through claimant's testimony and claimant's exhibits admitted into evidence at the preliminary hearing. KBI's principal argument in support of its allegation that claimant was not an employee, but instead was an independent contractor of respondent is based on the fact that respondent paid a lump sum amount for claimant's services per week to claimant doing business as John Grubb Construction and respondent did not deduct any withholding taxes from such lump sum payment. That one fact, however, does not, in and of itself, establish a contractor and subcontractor relationship. As noted above, the claimant has proved by preponderance of the credible evidence that respondent had control and also had the right to control claimant's employment activities and, therefore, claimant was an employee of the respondent for the purposes of the KWCA.

KBI also attempts to characterize the question of insurance coverage as a certain defense which is listed in the preliminary hearing statute as a jurisdictional issue subject

to Board review.[3] The term "certain defenses", however, refers to defenses subject to review by the Board only if they dispute the compensability of the injury under the KWCA.[4] Here, as in Carpenter, the insurance carrier is appealing the ALJ's determination on the issue of insurance policy coverage and the Board does not, at this juncture of the proceedings, have jurisdiction to review that issue.

WHEREFORE, it is the finding, decision and order of the Board that ALJ Steven J. Howard's May 16, 2001, preliminary hearing Order, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ___ day of September, 2001.

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BOARD MEMBER

c: Richard H. Seaton, Attorney for Claimant
. Randall J. Forbes and Mr. Clinton E. Patty, Attorneys for Respondent
Matthew S. Crowley, Attorney for Insurance Carrier
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

[3] *See* K.S.A. 44-534a(a)(2).

[4] *See* Carpenter v. National Filter Service, 26 Kan. App. 2d 672,Syl. ¶3, 994 P.2d 641(1999).